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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

~~HARRY R. SWANSON, AS SECRETARY OF THE STATE OF
NEBRASKA, ET AL.,~~

Appellants,

vs.

~~GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,~~

Appellees.

SUGGESTION OF A DIMINUTION OF THE RECORD
AND MOTION FOR A WRIT OF CERTIORARI.

~~MAY IT PLEASE THE COURT:~~

Your petitioners, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, suggest that there is a diminution of the record in the above entitled cause and respectfully move that this Honorable Court issue its writ of certiorari herein directed to the United States District Court for the District of Nebraska,

Lincoln Division, commanding that court to certify and send to this Court certain papers which are of record in that court in this cause. These papers are particularly described as follows:

1. Transcript of evidence upon the trial, held September 18, 19, 20 and 21, 1939, pages 1-503, inclusive, in question and answer form, as reported by Gordon L. Harman, Short-hand Reporter (Add. Tr. 1-503).¹
2. Deposition of Sigmund Spaeth in question and answer form, pages 4-88, inclusive (Add. Tr. 504-593).
3. Deposition of Abraham Schwartz in question and answer form, pages 89-171 (Add. Tr. 594-677).
4. Deposition of Walter S. Fischer in question and answer form, pages 172-246 (Add. Tr. 678-753).
5. Deposition of Irving Caesar in question and answer form, pages 247-291 (Add. Tr. 754-799).
6. Deposition of Edwin H. Morris in question and answer form, pages 292-335 (Add. Tr. 800-844).
7. Deposition of George W. Meyer in question and answer form, pages 336-366 (Add. Tr. 845-876).
8. Deposition of Ella Herbert Bartlett in question and answer form, pages 367-413 (Add. Tr. 877-924).
9. Deposition of Will Von Tilzer in question and answer form, pages 414-472 (Add. Tr. 925-984).
10. Deposition of Edgar Leslie in question and answer form, pages 473-515 (Add. Tr. 985-1034).
11. Deposition of Jerome Kern in question and answer form, pages 1-26 of California depositions (Add. Tr. 1035-1062).
12. Deposition of Sigmund Romberg, in question and answer form, pages 27-44 of California depositions (Add. Tr. 1063-1083).
13. Plaintiffs' Exhibit 13 annexed to deposition of Irving Caesar (list of Irving Caesar's compositions) (Add. Tr. 1310-1319).

¹ References to "Add. Tr." refer to pages of additional transcript certified by the Clerk of the District Court on December 23, 1940 and on file in this Court.

14. Plaintiffs' Exhibit 18 annexed to deposition of George W. Meyer (list of George W. Meyer's compositions) (Add. Tr. 1320-1331).

15. Plaintiffs' Exhibit 19 annexed to deposition of Ella Herbert Bartlett (Contract between Victor Herbert and M. Witmark & Sons [6/8/10]) (Add. Tr. 1361-1366).

16. Plaintiffs' Exhibit 20 annexed to deposition of Ella Herbert Bartlett (Contract dated 4/2/14 with Victor Herbert) (Add. Tr. 1367-1372).

17. Plaintiffs' Exhibit 21-E annexed to deposition of Ella Herbert Bartlett (Contract between Victor Herbert and T. B. Harms) (Add. Tr. 1332-1338).

18. Plaintiffs' Exhibit 22 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Red Mill") (Add. Tr. 1349-1350).

19. Plaintiffs' Exhibit 23 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Naughty Marietta") (Add. Tr. 1351-1352).

20. Plaintiffs' Exhibit 24 annexed to deposition of Ella Herbert Bartlett (Copyrights on "Mademoiselle Modiste") (Add. Tr. 1353-1355).

21. Plaintiffs' Exhibit 25 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Mademoiselle Modiste") (Add. Tr. 1356-1357).

22. Plaintiffs' Exhibit 26 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Red Mill") (Add. Tr. 1358-1359).

23. Plaintiffs' Exhibit 27 annexed to deposition of Ella Herbert Bartlett (Renewals of copyrights on "Babes in Toyland") (Add. Tr. 1360).

24. Plaintiffs' Exhibit 29 annexed to deposition of Edgar Leslie (list of Edgar Leslie's compositions) (Add. Tr. 1382-1383).

25. Exhibit 1 annexed to deposition of Jerome Kern (list of Jerome Kern's compositions) (Add. Tr. 1384-1400).

26. Exhibit 4 annexed to deposition of Sigmund Romberg (list of Sigmund Romberg's compositions) (Add. Tr. 1401-1410).

27. Plaintiffs' Trial Exhibit 1 (Gene Buck's compositions) (Add. Tr. 1084-1089).

28. Plaintiffs' Trial Exhibit 15 (in part). It is necessary to include only one of the twenty contracts embraced in this exhibit. That contract appears at pages ____ to ____ of Appellees' Additional Transcript. This typical contract should be used in place of appellants' summary (Appellants' Tr. Vol. III, p. 30).

29. Plaintiffs' Trial Exhibit 16 (in part). In addition to appellants' summary of this exhibit (Appellants' Tr., p. 30) or in lieu of the part thereof which describes a contract with a "newspaper-owned station," the record should include the contract between the Society and Huse Publishing Company (Add. Tr. 1452-1453).

30. Plaintiffs' Trial Exhibit 17 (tabulation of receipts from the State of Nebraska from January 1, 1928 to June 30, 1939 (Add. Tr. 1090).

31. Plaintiffs' Trial Exhibit 18 (Schedule of cost of operating and commissions paid in Nebraska, 1932-37) (Add. Tr. 1091).

32. Plaintiffs' Trial Exhibit 20 (Schedule of sheet music sales which grossed over a million copies) (Add. Tr. 1092-1094).

33. Plaintiffs' Trial Exhibit 21 (Schedule of licenses in effect 1922-39) (Add. Tr. 1095).

34. Plaintiffs' Trial Exhibit 22 (Page 1122 and first twenty lines of Page 1123 of Copyright Hearings, 1936) (Add. Tr. 1455-1456).

35. Plaintiffs' Trial Exhibit 29 (Table 19 of Federal Communications Commission Bulletin) (Add. Tr. 1096).

36. Plaintiffs' Trial Exhibit 32 (Sample sheet from ASCAP Index) (Add. Tr. 1097).

37. Plaintiffs' Trial Exhibit 33 (Circular explaining ASCAP Index) (Add. Tr. 1098-1105).

38. Plaintiffs' Trial Exhibit 35 (Advertisement of Lang-Worth Feature Programs, Inc.) (Add. Tr. 1106).

39. Plaintiffs' Trial Exhibit 36 (Chart showing Society's accounts with foreign societies) (Add. Tr. 1107).

40. Plaintiffs' Trial Exhibit 38 (List of compositions of William J. Hill) (Add. Tr. 1108-1111).

41. Plaintiffs' Trial Exhibit 39 (List of compositions of Philip Sousa) (Add. Tr. 1112-1123).

42. Plaintiffs' Trial Exhibit 40 (List of compositions of Oley Speaks) (Add. Tr. 1124-1127).
43. Plaintiffs' Trial Exhibit 41 (List of compositions of Deems Taylor) (Add. Tr. 1128-1131).
44. Plaintiffs' Trial Exhibit 42 (1921 contract between Society and Malec Bros.) (Add. Tr. 1132).
45. Plaintiffs' Trial Exhibit 43 (1922 contract between Society and Malec Bros.) (Add. Tr. 1133).
46. Plaintiffs' Trial Exhibit 44 (Letter from Amusement Owners Protective Association of Nebraska) (Add. Tr. 1134).
47. Plaintiffs' Trial Exhibit 49 (pages 140-143 of "Radio Broadcasting" for September, 1933) (Add. Tr. 1135-1138).
48. Plaintiffs' Trial Exhibit 53 (Letter of May 12, 1939 from E. N. Blazer to Eppley Hotels Co.) (Add. Tr. 1139-1140).
49. Plaintiffs' Trial Exhibit 62 (List of suits filed by the Society in Nebraska) (Add. Tr. 1141-1152).
50. Plaintiffs' Trial Exhibit 64 (Contract between SESAC and Station WOW) (Add. Tr. 1153-1155).
51. Defendants' Exhibit 45 (Agreement between National Broadcasting Company and Station WOW) (Add. Tr. 1156-1159).
52. Defendants' Exhibit 52 (Form of first notice sent by Society to infringers) (Add. Tr. 1160-1163).
53. Defendants' Exhibit 54 (Agreement between Columbia Broadcasting System and Station KOIL dated April 25, 1938) (Add. Tr. 1164-1169).
54. Defendants' Exhibit 58 (Answers to interrogatories propounded to Walter Fischer and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1275-1292).
55. Defendants' Exhibit 59 (Answers to interrogatories propounded to Saul Bornstein and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1293-1308).
56. Defendants' Exhibit 60 (Answers to interrogatories propounded to Gene Buck and exhibits 1, 2 and 3 thereto annexed) (Add. Tr. 1171-1250; 1373-1381).
57. Defendants' Exhibit 61 (Answers to interrogatories propounded to Gustave Schirmer and exhibits 1-10, inclusive, thereto annexed) (Add. Tr. 1251-1274).

58. Docket Entries (Add. Tr. 1464-1470).
59. Appellees' Designation of Additional Portions of Record filed July 26, 1940, with Proof of Service (Add. Tr. 1411-1414).
60. Counter-Designation of Record by Plaintiffs-Appellees, with Proof of Service, filed July 31, 1940 (Add. Tr. 1415-1420).
61. Counter-Designation filed pursuant to order of August 20, 1940, together with exhibits thereto annexed, together with Proof of Service thereof (Add. Tr. 1421-1457).
62. The request to the Clerk of the District Court to certify to this Court certain papers which are of record in that court in this cause, filed in the District Court on December 16, 1940 (Add. Tr. 1458-1463).
63. Certificate of the Clerk of the District Court, dated December 23, 1940, transmitting said papers to this Court (Add. Tr. 1472-1474).

Reasons for This Motion.

1. The Testimony in Question and Answer Form and Certain Exhibits must be Referred to in Resolving Certain Issues of Fact Raised by Appellants' Assignments of Error and Points Relied upon in this Court.
 - (a) Appellants' assignment of error "X" asserts that the court below erred in refusing to find a number of facts (App. Tr. 81).²
 - (b) Appellants' assignment of error "XH" attacks one of the findings of the court below holding that the State statute which the court held invalid could not possibly be complied with (App. Tr. 84).
 - (c) Appellants' assignment of error "III" refers to certain facts found by the court below and assigns as error that the injunction should not have been granted in view of those findings of fact (App. Tr. 78-79).

² References to "App. Tr." refer to pages of the transcript heretofore filed by appellants.

If there be any doubt about the interpretation to be placed on the facts found, it will be necessary to have all the evidence before the court.

(d) Appellants' assignment of error "VII" urges that certain sections of the statute should have been upheld because they were enacted as a proper exercise of the police power in view of "fraud and unlawful practices" perpetrated by appellees in Nebraska. Appellees dispute the existence of any such evidence, and in view of this assignment of error it is essential that all the evidence be before this Court (App. Tr. 80).

(e) Appellants' assignments of error "IX" and "XI" also raise questions of fact (App. Tr. 81).

2. Appellants Failed to File a Praecipe in the District Court promptly after Taking their Appeal as Required by Rule 10 (2) of the Rules of this Court.

(a) The appeal in this case was allowed on June 27, 1940 (App. Tr. I, 72-3). On the same day, appellants filed a document entitled "Brief and Authorities in Support of the Assignment of Errors and Law Points with Authorities to be Relied Upon for Reversal *in Lieu of the Designation Required by Supreme Court Rule No. 13 in Reference to Designation of Law Points*" (App. Tr. I, 85-91).

(b) Although that document purported to comply with Rule 13 of the Rules of this Court, it was not accompanied by a designation of the parts of the record which appellants thought necessary for the consideration of the points submitted. Nor was any designation filed at that time by appellants with the Clerk of the District Court indicating the portions of the record to be incorporated into the transcript as required by Rule 10 of the Rules of this Court.

(c) Appellees were at a loss to understand the nature of the record upon which appellants intended to rely. Appellees realized that it was necessary to send a transcript of the record to this Court within forty days after the time the appeal was allowed (this appeal having been allowed on June 27, 1940) and were uncertain as to whether appellants intended to present the case to this Court solely upon the papers served upon them on or about June 27, 1940 or whether they proposed to docket the full record in this Court.

(d) Appellees waited a reasonable time after June 27, 1940 and did not receive any *praecipe* from appellants as required by Rule 10, subdivision 2 of the Rules of this Court. Thereupon, on July 26, 1940 appellees, acting upon the assumption that appellants did not propose to incorporate in their record any papers other than those served on June 27, 1940, filed a designation of additional papers to be incorporated in the record (Add. Tr. 1411-14).

(e) The day after this designation was served and filed by appellees, appellants for the first time filed a *praecipe* dated July 27, 1940, with a request that the Clerk of the District Court file the same with the clerk of this court within forty days after June 27, 1940, i. e., on or before August 6, 1940 (App. Tr. I, 181-3). Said *praecipe* did not designate the testimony of the witnesses in question and answer form, but rather an alleged narrative of such testimony which had not been submitted to appellees and which, for reasons to be hereinafter stated, is incorrect and incomplete.

(f) Immediately upon receipt of these papers, appellees filed a new counter-designation on July 31, 1940 (Add. Tr. 1415-20) in which appellees stated their objections to certain parts of the record prepared by appellants and requested

the addition of certain other parts of the record (Add. Tr. 1415-20).

(g) Thereupon Judge Donohoe in the court below, entered an order on August 1, 1940 setting a hearing on September 6, 1940 to settle the differences between appellants and appellees. Thereafter, on August 20, 1940, the court below adjourned the hearing until October 7, 1940 and directed that an additional counter-designation be filed by appellees on or before September 23, 1940.

(h) Thereafter and in conformity with the said order, appellees served a further designation of additional parts of the record to be transmitted to this Court and a more detailed statement of their objections to the record as prepared by appellants (Add. Tr. 1421-57). In order to remove all doubt about the form of record which appellees considered proper, a full and complete itemization was made of the papers which appellees regarded as a proper record.

(i) Appellants filed a "Resistance to the Appellees' Counter-Designation of the Record on File Submitted and Filed by Appellants" on the ground, among others, that this Court was the appropriate forum to decide the contents of the record on appeal rather than the court below. Appellants there stated (p. 6):

"XVIII.

"That under Sub-division "H" of Rule 75 of the Code of Civil Procedure, and which is referred to and made a part as far as possible of Rule 10, Paragraph 2 of the Rules of the Supreme Court of the United States, this cause may be docketed upon appeal in the Supreme Court of the United States; and after the appeal, it is within the province of the appellate court, on a proper suggestion, to take cognizance and enter an order in accordance with the prayer hereof."

Other objections are also made to the counter-designations filed by appellees.

(j) On October 15, 1940, the court below entered an order overruling appellees' objections to the proposed record, and sustaining appellants' objections to the appellees' proposed additional portions of the record.

3. The Appellants' Transcript Is Defective in the Following Particulars:

(a) The oral testimony, depositions and answers to interrogatories are improperly condensed. Certain answers to interrogatories are entirely omitted. This may be corrected by substituting Items 1-12, inclusive, and Items 54-57, inclusive, of the papers described above (pages 1-1083; 1171-1308; 1373-81 of Additional Transcript) in place of Volume II of Appellants' Transcript, pages 1-128.

The purported condensation of the testimony does not fairly represent the testimony given. This applies to the testimony of each and every witness and to the whole thereof to such an extent that it would be useless to attempt to refer to any specific part of such testimony. We urge, therefore, that the purported condensation of appellants be eliminated and that the testimony in question and answer form be substituted as permitted by Rule 75(c) of the Rules of Civil Procedure.

Appellants' condensation of the testimony does not show how or for what purpose the exhibits were offered in evidence. For example, Plaintiffs' Exhibits 2, 3, 4 and 5 are bunched together without anything to show why they were offered in evidence (Appls. Tr. Vol. II, 2); Defendants' Exhibits 55, 56, 57, 58, 59, 60 and 61 are likewise bunched together in the record prepared by appellants without any indication of the manner in which or the purpose for which they were offered (Appls. Tr. Vol. II, 67). All the other exhibits are mentioned as if to support certain statements

purported to have been made by the witnesses without the necessary identification showing the purposes for which such exhibits were offered.

The depositions which were read into the record (Add. Tr. 307-14) show the practical effect of the state statute upon composers, authors and publishers of copyrighted works. Appellants have summarized those depositions in the same manner as the testimony of the witnesses who appeared at the trial. These summaries appear at pages 70-124, inclusive, of the record prepared by appellants.

The answers to interrogatories, with exhibits thereto annexed, addressed by appellants to certain of the plaintiffs and their officers were placed in evidence by appellants as their Exhibits 58, 59, 60 and 61 (App. Tr. Vol. II, 67, Vol. III, 41, Add. Tr. 1171-1308). Thus appellants admitted their relevancy. Yet appellants summarily dismissed them in their proposed record by merely referring to a single question and the answer thereto and taking excerpts from a single form of contract (App. Tr. Vol. II, 125-128). The answers to interrogatories addressed to plaintiff Gene Buck were *completely* omitted with appellants' statement that "in the main all of the answers to the interrogatories which he answered were covered by his testimony given at the trial and, therefore, the same is not repeated herein." Appellees refrained from taking up the time of the court below with the oral testimony of Mr. Buck concerning the many matters which were covered in his answers to the interrogatories; appellants must have been of the same opinion because they themselves offered these answers to interrogatories in evidence. Those answers and the exhibits annexed thereto should be a part of the record before this Court.

(b) Certain exhibits are incorrectly summarized in Volume III of Appellants' Transcript. We request that in these cases the entire exhibits be incorporated in the record. Items 13-27, inclusive, and Items 30-53, inclusive, of the

papers described above (pages 1310-1410; 1084-1169; 1436-1456 of Additional Transcript) should be substituted in place of the summaries of those exhibits appearing in Volume III of Appellants' Transcript, pages 46-49, 29, 31-39 and 41.

It will not be necessary to print all these exhibits in full. Certain of them were also made exhibits in the companion cases of *Gibbs v. Buck* and *Buck v. Gibbs* (October Term, Nos. 610 and 611, respectively) and short summaries of such exhibits have been agreed to by both parties in those cases. If similar summaries are acceptable to appellants in the case at bar, a considerable amount of printing will be saved. This applies to Items 13, 14, 24, 25, 26, 27, 41, 42, and 43 of the papers designated above, being Plaintiffs' Deposition Exhibits 13, 18 and 29 annexed to the depositions taken in New York, and Exhibits 1 and 4 annexed to the depositions taken in California, and Plaintiffs' Trial Exhibits 1, 39, 40 and 41, respectively.

The summaries referred to above will be annexed to appellees' designation of the parts of the record to be relied on, if this application is granted.

(c) Certain exhibits which have been incorrectly summarized by appellants include a number of contracts. It is necessary that one of the typical contracts in each case be before the court. This is provided for in Items 28 and 29 of the papers designated above, which should be used to supplement certain statements in appellants' summary of Plaintiffs' Trial Exhibits 15 and 16 (Appls. Tr. Vol. III, pp. 30-31).

(d) Items 58-62, inclusive, of the papers designated above, consist of Docket Entries and designations of portions of the record filed in the court below. This may be dispensed with in printing but they should be before this

Court to facilitate the preparation and printing of the record.

(e) Item 63 of the papers designated above is the Certificate of the Clerk of the District Court, dated December 23, 1940, transmitting to this Court the papers described in Items 1-62, inclusive.

The record in this cause has not yet been printed. This application is made before the printing of the record so that there will be no delay in the argument of this cause, together with the argument of the companion cases of *Gibbs v. Buck* and *Buck v. Gibbs* (October Term, Nos. 610-611, respectively).

4. Appellees Are Entitled Under Rule 10 (2) of This Court to Have the Testimony of Witnesses in Question and Answer Form Substituted for the Alleged Narrative Statement of Appellants.

Rule 10 (2) of this Court provides that Sec. (e) of Rule 75 of the Rules of Civil Procedure is applicable to an appeal to this Court from a Federal District Court. Such latter Rule provides that an appellee, if dissatisfied with the narrative statement prepared by the appellant, "may require testimony in question and answer form to be substituted for all or a part" of said narrative statement. As previously stated, appellees are dissatisfied with the whole of the narrative statement prepared by appellants. It follows that appellees are entitled to have the testimony in question and answer form, including, of course, the depositions, substituted for the alleged narrative statement of the appellants.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of, and under the seal of this Honorable Court directed to the United States District Court for the District of Nebraska, Lincoln Division, commanding that court

to certify and send to this Court the papers enumerated herein.

THOMAS G. HAIGHT,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
Counsel for Appellees.

I, Herman Finkelstein, counsel for the appellees in the above entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true; except such facts as are alleged upon information and belief, and as to those facts, that I believe them to be true.

HERMAN FINKELSTEIN,
Counsel for Appellees.

Sworn to and subscribed before me this 11th day of January, 1941.

[SEAL.]

FRANCES P. STANLEY,
Notary Public, D. C.

My commission expires February 15, 1942.

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